

JUN 09 2004



Michael N. Milby, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES
LITIGATION

MDL Docket No. 1446

This Document Relates To:

Civil Action No. H-01-3624
(Consolidated)

MARK NEWBY, *et al.*, Individually and On
Behalf of All Others Similarly Situated,

Plaintiffs,

vs.

ENRON CORP., *et al.*,

Defendants.

CONSECO ANNUITY ASSURANCE
COMPANY, Individually and on Behalf
of All Others Similarly Situated,

H-03-CV-2240

Plaintiff,

v.

CITIGROUP, INC., CITIBANK, N.A.,
CITICORP, SALOMON SMITH

BARNEY, SALOMON BROTHERS
INTERNATIONAL LIMITED, *et al.*,

Defendants.

CONSECO ANNUITY ASSURANCE COMPANY'S REPLY MEMORANDUM OF LAW
IN FURTHER SUPPORT OF CONSECO'S MOTION FOR RECONSIDERATION OF
THE COURT'S JUNE 1, 2004 ORDER GRANTING THE REGENTS OF THE
UNIVERSITY OF CALIFORNIA LEAVE TO GIVE NOTICE TO CERTAIN CLASS
MEMBERS PURSUANT TO RULE 23(d)(2)

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Conseco Annuity Assurance Company ("Conseco") respectfully submits this Reply Memorandum Of Law In Further Support Of Conseco's Motion For Reconsideration Of The Court's June 1st 2004 Order Granting The Regents Of The University Of California ("The Regents") Leave To Give Notice To Certain Class Members Pursuant To Rule 23(d)(2).

I. THE COURT SHOULD GRANT CONSECO'S MOTION FOR RECONSIDERATION BECAUSE THE REGENTS' NOTICE IS MISLEADING

A. The Regents' Notice Is Misleading Because It Fails To State That The Section 10(b) Claims Asserted On Behalf Of Purchasers Of \$ 750 Million Of Yosemite I Citigroup CLNs Are Time-Barred In The Newby Action And That, Because These Claims Are Time-Barred, The Regents May Not Pursue Section 20(a) Claims On Behalf Of These Purchasers As The Regents Has Argued

In an unsuccessful attempt to avoid the conclusion that The Regents' Notice is misleading¹, and that the dissemination of such notice would work a manifest injustice on purchasers of Yosemite I Citigroup Credit Linked Notes ("CLNs"), The Regents states "assuming arguendo that Conseco is correct (that [The Regents] does not have a § 10(b) claim based on Yosemite I), purchasers of Yosemite I have a timely claim, in the Newby Action, under § 20(a) (control person liability) against Citigroup." The Regents' Br. at 3. Such argument, however, fails as a matter of law.

Courts have held that where a Section 10(b) claim is time-barred, as in the Newby Action, a claim for Section 20(a) control person liability must be dismissed because no primary violation exists. See, e.g., Jackson Nat'l Life Insur. Co. v. Merrill Lynch & Co., Inc., 32 F. 3d 697 (2nd Cir. 1994); Havenick v. Network Express, Inc., 981 F. Supp. 480, 522 (E.D.Mi. 1997). Relying

¹ As demonstrated in prior submissions, The Regents' Notice Of Dismissal To Certain Class Members ("The Regents' Notice") is misleading because it states "...The Regents may, on your behalf, pursue § 10(b) claims, which are fraud claims," when in fact, such claims are barred in the Newby Action by the running of the three-year statute of repose applicable in the Newby Action. See Order Re: Citigroup Defendants Motion To Dismiss, dated April 1, 2004 (the "April 1st Order") at 5. See also Order Re: CIBC Defendants Motion To Dismiss dated April 1, 2004.

on Jackson Nat'l, the District Court in Havenick explicitly held, “...the Court finds that Plaintiffs’ Section 10(b) and Rule 10b-5 claims are barred by the statute of limitations. As a result, Plaintiffs’ Section 20(a) claims must be dismissed because to maintain the Section 20(a), 15 U.S.C. § 78t, claims Plaintiff needs a predicate Section 10(b) or Rule10b-5 claim.” Havenick v. Network Express, Inc., 981 at 522(emphasis added).

Similarly, in Salinger v. Projectavision, Inc., the court held that in the absence of a primary violation of Section 10(b) or Rule 10b-5, a plaintiff cannot state a claim for controlling person liability under Section 20(a) of the Securities Exchange Act. “Thus because plaintiffs’ § 10(b) and Rule 10b-5 claim fails (as it is time-barred), the plaintiffs’ claim for controlling person liability is dismissed.” Salinger v. Projectavision, Inc., 972 F. Supp. 222, 235 (S.D.N.Y. 1997)(internal citations omitted)(emphasis added). See also Lillard v. Stockton, 267 F.Supp.2d 1081, 1121-1122 (N. D. Ok. 2003); Payne v. Fidelity Homes of America, 437 F. Supp. 656, 658 (W.D. Ky. 1977).²

The Regents’ cannot pursue Section 20(a) claims on behalf of purchasers of \$ 750 million of Yosemite I Citigroup CLNs because The Regents’ Section 10(b) and Rule 10b-5 claims are barred by the statute of limitations. As a result, Plaintiffs’ Section 20(a) claims must be dismissed because to maintain the Section 20(a), 15 U.S.C. § 78t, claims Plaintiff needs a predicate Section 10(b) or Rule10b-5 claim.” Havenick v. Network Express, Inc., 981 at 522. Because The Regents’ Notice fails to disclose two critical facts, namely that The Regents may

² Cases cited by The Regents support Consecos argument. None of the cases cited by The Regents state that a plaintiff may pursue a cause of action for control person liability when the underlying primary violation is barred by the applicable statute of limitations. Instead, such cases stand for the mere proposition that a plaintiff need not name a primary violator as a defendant in order to pursue a claim for control person liability against another party. See, e.g., SEC v. Savoy Indus., Inc., 587 F.2d 1149, 1170 n.47 (D.C. Cir. 1978); CitiSource, Inc. Sec. Litig., 694 F. Supp. 1069, 1077 (S.D.N.Y. 1988); Briggs v. Sterner, 529 F. Supp 1155, 1171 (S.D. Iowa 1981). Consecos does not argue that The Regents’ Section 20(a) claims fail because the primary violators, the Citigroup subsidiaries, were not named in The Regents’ Complaint, but because the Section 10(b)5 claims against these subsidiaries are time-barred.

not assert either a Section 10(b) claim or a Section 20(a) claim on behalf of purchasers of Yosemite I Citigroup CLNs, The Regents' Notice is materially misleading.

Accordingly, this Court should grant Consecos Motion For Reconsideration, and upon reconsideration, deny The Regents' Motion For Leave To Give Notice to the extent that it seeks leave to send any notice to Yosemite I Citigroup CLN purchasers.

B. The Regents' Notice Would Mislead Purchasers Of Yosemite I, CLN I And CLN II Citigroup Credit Linked Notes Into Believing That They Must Intervene In The Newby Action In Order To Preserve Their Section 12(a)(2) Claims

As demonstrated in Consecos initial submission, The Regents' Notice would also mislead purchasers of Yosemite I, CLN I, and CLN II Citigroup Credit Linked Notes into believing that "unless a class member to whom this notice is directed steps forward to serve as a class representative on the Section 12(a)(2) claims, those Section 12(a)(2) claims on behalf of a putative class may be dismissed." Notice at 2. That statement is misleading because it fails to disclose that Consecos, which has standing to assert Section 12(a)(2) claims on behalf of the purchasers of those Citigroup CLNs, is pursuing those claims in the Consecos Action. Misleading purchasers of these Citigroup CLNs to intervene in the Newby Action would work a further manifest injustice.

The Regents does not dispute the misleading nature of The Regents' Notice, in this regard, but instead asserts, that The Regents is "following guidance from the Court in the Newby Action which has made clear that if at the time of class certification purchasers with privity do not step forward to press § 12(a)(2) claims, those claims will be dismissed." The Regents' Br. at 3. In fact, while the Section 12(a)(2) claims in Newby would be dismissed, those claims, on behalf of all of the Yosemite I Citigroup CLN, CLN I and CLN II Credit Linked Notes

purchasers, in the Consecos Action, would remain fully viable. The Regents' Notice fails to disclose those facts and is therefore misleading.

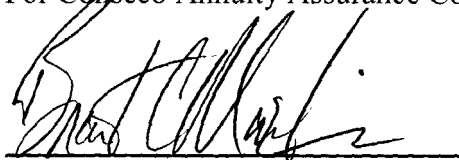
Accordingly, Consecos respectfully requests that this Court grant Consecos Motion For Reconsideration, and upon reconsideration, deny The Regents' Motion For Leave To Give Notice to the extent that it seeks leave to send any notice to Yosemite I Citigroup CLN, CLN I and CLN II Credit Linked Notes purchasers.

CONCLUSION

For the foregoing reasons, Consecos respectfully requests that this Court issue an order: (i) granting Consecos Motion For Reconsideration; and (ii) upon reconsideration, amend the Court's June 1st Order so that it does not authorize The Regents to give any notice to the purchasers of to Yosemite I Citigroup CLN, CLN I and CLN II.³

Dated: June 10, 2004

Respectfully submitted by the Attorneys
For Consecos Annuity Assurance Company,



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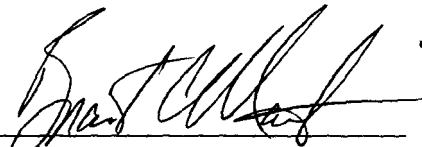
³ Consecos Cross Motion For Leave To Give Notice To Purchasers Of Yosemite II, Sterling And Euro Citigroup CLNs filed on May 27, 2004 remains sub judice. For the reasons set forth therein, Consecos also respectfully requests that such motion be granted.

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of June 2004, I caused a true and correct copy of the foregoing instrument to be served on all counsel of record by posting in PDF format to www.esl3624.com.



Brant C. Martin